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No. 91-2037

In The

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN; TOMMY G. THOMPSON, Governor of the State of Wisconsin; DONALD J. HANAWAY, Attorney General of the State of Wisconsin; DAVID VERNON PENN, District Attorney of Vilas County, Wisconsin; and JANET L. MARVIN, District Attorney of Forest County, Wisconsin,

Petitioners,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and the SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court agree to hear a case in which the sole issue is whether the appeals court properly concluded that a post judgment motion fell within Rule 59(e) such that under Fed. R. App. P. 4(a)(4) a notice of appeal would only be effective if filed after the district court ruled on said motion, when there is no conflict in the Circuits and when Rule 4(a)(4) will soon be amended to eliminate the issue raised by petitioners?

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INTRODUCTION

Respondent Lac du Flambeau Band of Lake Superior Chippewa Indians respectfully requests this Court deny the petition for a writ of certiorari requesting it to review

the March 23, 1992, decision and judgment of the United States Court of Appeals for the Seventh Circuit in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515 (7th Cir. 1992) (hereinafter *"Flambeau III"*), wherein the court correctly dismissed the petitioners' appeal for lack of jurisdiction. (A.1)

STATEMENT OF THE CASE

Respondent Lac du Flambeau Band of Lake Superior Chippewa Indians (hereinafter "Flambeau") and respondent Sokaogon Chippewa Community, both federally recognized tribes of Chippewa Indians with reservations in Wisconsin, filed suit in May, 1990, against petitioners State of Wisconsin and named state governmental officials (hereinafter "the State") under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (Supp. 1992) (hereinafter "IGRA"). When Congress adopted IGRA in 1988, it established a comprehensive scheme for the regulation of tribal gaming on Indian lands. The tribes' suit alleged the State had failed to negotiate in good faith for the conclusion of a tribal/state gaming compact governing the play of class III gaming, as that term is defined in the Act. The State argued it was precluded as a matter of law from negotiating with the tribes over a wide range of casino style gaming activities for their potential inclusion within a compact.

On June 18, 1991, the district court entered its Opinion and Order, denying the State's motion for summary judgment. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991)

(hereinafter *"Flambeau II"*). (A.49) The court further ordered that, pursuant to 25 U.S.C. § 2710(d)(7)(B)(ii), the State of Wisconsin was required to conclude a tribal/state class III gaming compact with the tribes within sixty days from the date of the order.[1] (A.49)

On June 21, 1991, the Clerk of the district court, with the district court judge's approval as to form, entered final judgment in the case. (A.46)

On June 27, 1991, Flambeau served and filed a motion asking the district court to vacate and set aside the judgment that had been entered in its favor. (A.44) In its brief supporting its motion, Flambeau contended that the district court's entry of judgment was premature for two reasons. First, Flambeau argued that it had sued the state under IGRA in order to obtain a compact. When the district court issued its June 18, 1991 Opinion and Order, it resolved a significant legal dispute between the parties concerning the proper scope of games about which the state and respondent were required to negotiate for potential inclusion within a class III gaming compact. However, the case was not concluded, since a compact between the parties (or its equivalent under IGRA, 25 U.S.C. § 2710(d)(7)(B)(vii)) was not in place.

Second, although respondent had prevailed thus far in the district court, it argued that additional issues

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[1] Flambeau and the State were unable to conclude a compact within the court ordered sixty day period. A mediator was appointed by the district court, pursuant to IGRA, who thereafter selected the State's last best offer of compact. On March 23, 1992, the State consented to the mediator's selection of the States' compact, which has governed the parties since then.

remained for the court's disposition, including the possible appointment of a mediator under § 2710(d)(7)(B)(iv) and the possible review of the mediator's selection of a last best offer of compact to determine whether the selection comported with the standard set forth in IGRA. *Id.* In short, respondent argued that the case was not over. If the district court had granted Flambeau's motion, there would not have been a final and appealable order, within the meaning of 28 U.S.C. § 1291 (1988), from the district court at that time; and any appeal sought by the State would have been interlocutory in nature, and therefore, appealable only if the requirements set forth in 28 U.S.C. § 1292 (1988) were met. (A.37)

On July 17, 1991, after the parties had exchanged briefs on the respondent's motion to vacate, but before the district court had issued its decision on the pending motion, petitioners filed their notice of appeal. (A.12)

On July 22, 1991, the district judge denied the respondent's motion to vacate and set aside judgment. (A.10) No further notice of appeal was filed.

On February 19, 1992, during oral argument on petitioner's appeal, the panel of the Court of Appeals for the Seventh Circuit raised a question regarding that court's jurisdiction in view of Fed. R. App. P. 4(a)(4) and this Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).[2] The appeals court requested the

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[2] Fed. R. App. P. 4(a)(4) provides that a notice of appeal filed before the disposition of a timely motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment "shall have no effect. A new notice of appeal must be filed within the prescribed time

parties file simultaneous supplemental briefs addressing whether respondent's timely motion to vacate and set aside judgment constituted a Fed. R. Civ. P. 59(e) motion to alter or amend such that under Fed. R. App. P. 4(a)(4) a notice of appeal would only be timely if filed within 30 days after the district court ruled on said motion.

On March 23, 1992, the Court of Appeals issued its decision (A.1) and judgment (A.6) holding that respondent's motion to vacate and set aside judgment was a Rule 59(e) motion because it presented "matters encompassed within the merits of the underlying action." *Flambeau III*, 957 F.2d at 517, *quoting with approval Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989). (A.4) Therefore, petitioners' notice of appeal filed prior to the entry of the order disposing of the motion to vacate "drop[ped] off the face of the planet," *Flambeau III* at 515, *citing Griggs*, 459 U.S. 56, (A.1) and the appeal was dismissed for want of jurisdiction.

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measured from the entry of the order disposing of the motion as provided above." Fed. R. App. P. 4(a)(4). With regard to the notice of appeal filed *before* the district court rules on a timely filed Rule 59 motion, "it is as if no notice of appeal were filed at all." *Griggs*, 459 U.S. at 61.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT AND OTHER COURTS OF APPEALS ON WHETHER A TIMELY FILED MOTION TO VACATE CONSTITUTES A MOTION TO ALTER OR AMEND A JUDGMENT UNDER FED. R. CIV. P. 59(e)

There is no conflict between the Seventh Circuit and other circuits regarding whether a motion to alter or amend a judgment falls under Fed. R. Civ. P. 59(e). Petitioners endeavor to create the image of a conflict, but review of the rulings in the various courts of appeals reveals that no such conflict exists.

The Seventh Circuit articulated its rule in *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), wherein it adopted the bright-line rule formulated in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 930 (1986), that "all substantive motions served within 10 days of the entry of a judgment will be treated as based on Rule 59 . . . ." *Charles v. Daley*, 799 F.2d at 347. The Seventh Circuit defined "substantive motion" to mean "one that if granted would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file something." *United States v. Gargano*, 826 F.2d 610, 611 (7th Cir. 1987). Thus, a motion is not "substantive" unless it questions the correctness of the district court judgment.

Although some of the circuits use slightly varying language, all the circuits addressing the question have

applied substantially the same rule. *See Foman v. Davis*, 292 F.2d 85, 87 (1st Cir. 1961), *rev'd on other grounds*, 371 U.S. 178 (1962); *Rados v. Celotex Corp.*, 809 F.2d 170, 171 (2d Cir. 1986); *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 859 (3d Cir. 1970); *Dove v. CODESCO*, 569 F.2d 807, 809 (4th Cir. 1978); *York v. Tate*, 858 F.2d 322, 326 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989); *In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990); *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1442 (9th Cir. 1986); *Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 703-704 (10th Cir. 1988); and *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1526 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1988).

Although the various circuits may have refined the rule to some degree, they have not changed it. Looking past the rhetoric, the rule applied in the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th Circuits is the same. For example, in *Osterneck*, 825 F.2d 1521, the Eleventh Circuit admitted that its "own distinction between collateral and noncollateral matters is sufficient for the purpose at hand and achieves the same result as that suggested by *Harcon's* per se rule." *Id.* at 1527 n.9.

In sum, there is no conflict between or among the circuits regarding the rule for determining whether a timely filed postjudgment motion properly falls within the confines of Rule 59(e).

II. THE COURT SHOULD DECLINE TO GRANT THE WRIT BECAUSE A PROPOSED AMENDMENT TO FED. R. APP. P. 4(a)(4) IS CURRENTLY BEING CIRCULATED BEFORE THE BENCH AND BAR

The characterization of postjudgment motions has been a vexing problem because the selection of the rule upon which the motion is based determines appellate jurisdiction. Because the 1979 amendment of Rule 4(a)(4) created a trap for unsuspecting litigants, especially pro se litigants,[3] the Judicial Conference Advisory Committee on Appellate Rules has prepared a preliminary draft of proposed amendments to Fed. R. App. P. 4, dated August, 1991, which is currently circulating among the Bench and Bar for comment. *Proposed Rules*, 137 F.R.D. 417, 444 (1991). The proposed amended Rule 4(a)(4) would provide that notices of appeal filed before disposition of the specified postjudgment motions would be "held in abeyance and spring into force when the judge acts."[4]

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[3] In the case at bar, the State of Wisconsin has been represented at all times by the Attorney General of Wisconsin.

[4] (4)If any party makes a timely motion under the Federal Rules of Civil Procedure: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; (iv) under Rule 54 for costs or attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order delaying entry of judgment and extending the time for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after entry of judgment,

Flambeau III, 957 F.2d at 516. (A.2) Therefore, to the extent petitioners' jurisdictional difficulty was caused by counsel's error (*Id.*), the proposed amendment to appellate Rule 4(a)(4) will eliminate the problem. For this reason alone, it would be imprudent for the Court to grant petitioners' writ.

In addressing the characterization problem, the Advisory Committee has acknowledged approval and acceptance of a bright-line rule, like the Seventh Circuit's rule in *Charles v. Daley*, 799 F.2d 343. In proposing such an amendment, the Advisory Committee seeks to eliminate the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a motion under Rule 59(e) or under Rule 60. "The [proposed] amendment is consistent with the practice in several circuits that treat all motions to alter or amend judgments that are made within 10 days after entry of judgment as

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> the time for appeal for all parties shall run from the entry of the order disposing of the last of all such motions. A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions. An appeal from an order disposing of any of the above motions requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Proposed Rules, 137 F.R.D. 417, 437-39 (1991).

Rule 59(e) motions for purposes of Rule 4(a)(4)." *Proposed Rules,* 137 F.R.D. at 445.

Therefore, it is pointless for the Court to grant the State's writ in order to address the question of whether respondent's timely motion to vacate is a Rule 59(e) motion, since the Advisory Committee is currently in the process of eliminating the characterization problem posed by Fed. R. App. P. 4(a)(4).

III. THE SEVENTH CIRCUIT COURT OF APPEALS GAVE FULL CONSIDERATION TO WHETHER THE MOTION TO VACATE AND SET ASIDE JUDGMENT WAS A MOTION TO ALTER OR AMEND A JUDGMENT WITHIN THE MEANING OF FED. R. CIV. P. 59(e) AND DECIDED THE ISSUE CORRECTLY

As previously stated, the issue addressed by the Seventh Circuit was whether Flambeau's timely filed motion to vacate was one under Fed. R. Civ. P. 59(e) to alter or amend the judgment. The appeals court properly concluded that respondent's motion fell within Rule 59(e). Petitioners would have the Court grant certiorari solely to review the appeals court's interpretation of the nature of respondent's June 27, 1991 motion.

The Seventh Circuit adopted the bright-line rule formulated in *Harcon Barge,* 784 F.2d 665,[5] because "[t]he

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[5] The rationale for *Harcon Barge* and the policy reasons underlying that decision were the bases for the Seventh Circuit's adoption of the same rule. *See Charles v. Daley,* 799 F.2d at 347. The fact that this Court later concluded that a motion to tax

characterization of post-judgment motions has been a vexing one . . . . " *Charles v. Daley*, 799 F.2d at 347. It was attempting to set forth a clear and simple rule for determining when a judgment would be treated as based on Rule 59 in order that the parties would not forfeit appeals by accident. *Id.* Notwithstanding this clear rule,[6] petitioners ignored it and instead engaged in the type of hair-splitting analysis that the rule was intended to avoid.

Petitioners' argue that respondent's motion to vacate was not substantive. However, in support of their argument, petitioners rely on cases wherein the motions were truly collateral to the judgment. *See Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984) (motion to alter or amend final judgment with respect to the allocation of costs under Fed. R. Civ. P. 54(d)); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (motion to alter or amend judgment due to court's failure to memorialize part of its decision); and *West v. Keve*, 721 F.2d 91 (3d Cir. 1983) (motion for award of attorney fees).

Indeed, this Court has addressed the question of whether certain motions fall within the ambit of Rule

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costs fell outside Rule 59(e), *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988), does not detract from the general rule that timely filed substantive motions are properly treated as within Rule 59(e). *Buchanan* merely clarified that a motion for costs is not substantive because it " 'does not imply a change in the judgment, but merely seeks what is due *because* of the judgment.' " *Id., citing White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, at 452, *quoting Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980) (emphasis added).

[6] The court has endorsed the use of a bright-line rule in the same jurisdictional context in *Budinich v. Becton Dickson & Co.*, 486 U.S. 196, 202 (1988).

59(e) in four recent decisions. *See Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988) (timely filed postjudgment motion for costs does not constitute a Rule 59(e) motion because it is ancillary to the judgment); *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982) (timely filed postjudgment request for attorney fees under 42 U.S.C. § 1988 is not a Rule 59(e) motion); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (outstanding issue of award of attorney fees does not prevent judgment on the merits from being final); *Osterneck*, 489 U.S. 169 (postjudgment motion for discretionary prejudgment interest constitutes a Rule 59(e) motion to alter or amend judgment).

The Seventh Circuit, when faced with similar postjudgment motions, has consistently ruled that issues collateral to the main cause of action do not fall within the ambit of the Rule 59(e). *See Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1247-48 (7th Cir. 1982), *reh'g denied*, 466 U.S. 994 (1984) (motion to amend judgment to assess attorney fees is not a Rule 59(e) motion, because it raises issues collateral to the main cause of action); *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 231 (7th Cir. 1990) (motion for costs and attorney's fees was not a Rule 59(e) motion); and *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 849 (7th Cir. 1981) (motion for extension of time to file a motion to vacate did not propose an alteration or amendment of the judgment and, therefore, was not a Rule 59(e) motion). Such motions would not result in a *change* in a judgment,

but instead merely seek what is due *because* of a judgment.[7]

This Court has made it clear that in order for a motion to fall within Rule 59(e), it must involve a reconsideration of some aspect of the decision on the merits. *White*, 455 U.S. at 451; *Osterneck*, 489 U.S. at 174; *Budinich*, 486 U.S. at 200. Although couched in slightly different terms, this is the same standard as adopted by the Seventh Circuit, which requires that motions be "substantive" in order to fall within Rule 59(e).

Without doubt, respondent's motion was substantive in nature. It raised no issues that could be construed as collateral to the main claims for relief under IGRA. If the motion to vacate had been granted, the judgment would have been set aside, thus substantively altering the judgment as it stood on June 21, 1991, and, therefore, delaying the time for filing a notice of appeal until a final judgment was entered at a later date. Clearly, Flambeau's motion to vacate contemplated a change in the judgment. It is beyond comprehension that a motion to change a judgment falls within Rule 59(e), but a motion to vacate a judgment entirely, as petitioners argue, falls outside of

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[7] The proposed amendment to Fed. R. App. P. 4(a)(4) specifically excludes motions for costs and attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order delaying the entry of judgment and extending the time for appeal. This language was inserted "to conform to recent Supreme court decisions, *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988); *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988)." *Proposed Rules*, 137 F.R.D. at 445.

Rule 59(e). There can be no greater alteration in a judgment than to eliminate it. Citing *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984), and *United States v. Gargano*, 826 F.2d at 611, the appeals court concluded that vacation is a form of alteration.[8] *Flambeau III*, 957 F.2d at 517 (A.4). Any other conclusion would lead to massive confusion among the circuits, the attorneys and the parties.

Petitioners assert that the Seventh Circuit's adoption of the so-called "bright-line rule," means that it fails to analyze motions to determine whether they are substantive, and therefore, within the scope of Rule 59(e). Petition at 12. But petitioners' contention is belied by the Seventh Circuit's analysis and conclusion in the case at bar. Here, the court applied the bright-line rule correctly, carefully analyzing the issues raised in the motion and holding that the "motion to vacate the judgment in its entirety presents 'matters encompassed within the merits of the underlying action.' " *Flambeau III*, 957 F.2d at 517 (A.4).

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[8] The Advisory Committee on Appellate Rules made it undeniably clear when the 1979 amendments were adopted that a motion "under Rule 59 to alter or amend the judgment" would include a motion to vacate.

> The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. . . . [I]t would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would *vacate or alter* the judgment appealed from.

Fed. R. App. P. 4(a)(4) (Note to Subdivision (a)(4)) (citations omitted) *quoted in Griggs*, 459 U.S. at 60 n.2 (emphasis added).

Clearly, the Seventh Circuit understands the difference between motions raising substantive, as opposed to collateral, matters. *See e.g., Martinez v. Trainor,* 556 F.2d 818 (7th Cir. 1977), (a *skeleton* motion to alter, amend or vacate a declaratory judgment was not a proper motion under Fed. R. Civ. P. 59(e)).[9] Thus, petitioners' accusation that the appeals court mechanically applied the bright-line rule in holding that respondent's motion constituted a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e), is simply not correct.

The heart of petitioners' argument is that the motion cannot properly be characterized as falling within Rule 59(e) because it raised issues regarding the finality of the judgment under 28 U.S.C. § 1291. Questions regarding finality, according to petitioners, raise legal issues collateral to the main cause of action. Petition at 13-14. Petitioners' analysis, however, misses the point.

The Court has been clear that whether a particular kind of motion constitutes a Rule 59(e) motion is closely related to whether a judgment is final for purposes of 28 U.S.C. § 1291. *Osterneck,* 489 U.S. at 175. The question in *Budinich,* 486 U.S. 196, was whether an outstanding post-judgment motion for attorney fees deprives the judgment of finality. Since the judgment is fully enforceable irrespective of the collateral issue of attorney fees, such postjudgment motions fall outside of Rule 59(e) and do

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[9] *See also Spray-Rite Serv. Corp. v. Monsanto Co.,* 684 F.2d 1226; *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.,* 896 F.2d 228; *A.D. Weiss Lithograph Co. v. Illinois Adhesive Prod. Co.,* 705 F.2d 249 (7th Cir. 1983); and *Textile Banking Co. v. Rentschler,* 657 F.2d 844.

not deprive the judgment of finality for purposes of appeal.

Contrast *Budinich*, 486 U.S. 196, with *Osterneck*, 489 U.S. 169. In *Osterneck* the Court held that a postjudgment motion for discretionary prejudgment interest implicates the merits of the district court's judgment because such an award raises issues of fairness to the injured party and requires examination of the damages awarded and whether prejudgment interest is required to make the injured party whole. Of equal importance is that without the calculation of prejudgment interest to be included within the damages award, the judgment from the district court would not be final and there would be nothing from which the aggrieved party could appeal.

In the case at bar, respondent's postjudgment motion sought to eliminate the district court's judgment in its entirety. Respondent claimed the case was not concluded and that entry of judgment was premature. Had respondent's motion been granted, there would have been no final judgment and nothing from which either party could appeal. On this precise issue, the Court of Appeals stated:

> Until the court has resolved the motion, the subject (if any) to be presented on appeal cannot be known. The tribe made a simple point: it wants a compact with Wisconsin, leading it to submit that judgment directed exclusively to negotiation is premature. Had the court accepted this position, it would have annulled its judgment, leaving nothing from which the State could appeal.

Flambeau III, 957 F.2d at 517 (A.4). Thus, respondent's motion did not raise an issue collateral to the judgment, such as attorney fees. Clearly, the motion presented matters encompassed within the merits of IGRA and the underlying action, and if granted, would have deprived the court of appeals of any jurisdiction as a matter of right. The fact that Flambeau did not challenge the district court's interpretation of IGRA, as petitioners emphasize, is not relevant to the issue before the Court and does not change the character of the motion as substantive in nature.

The Seventh Circuit's decision dismissing the appeal was correct. Its reasoning was consistent with the Court's reasoning in *White*, 455 U.S. 445; *Buchanan*, 485 U.S. 265; *Budinich*, 486 U.S. 196; and *Osterneck*, 489 U.S. 169. *See also United States v. Ibarra*, ___ U.S. ___, 112 S.Ct. 4 (1991).

CONCLUSION

Respondent's motion to vacate and set the judgment aside on the grounds that the case had not been concluded and that respondent was likely entitled to additional relief under IGRA was a Rule 59(e) motion. Contrary to petitioners' assertion, there is no conflict among the circuits regarding the rule governing characterization of postjudgment motions falling within Rule 59(e); and the Seventh Circuit properly decided the case within the teaching of the Court's recent decisions on the same and closely related subjects. In any event, to the extent that the present Rule 4(a)(4) creates confusion, it

will likely soon be resolved with the adoption of the proposed amendment.

Therefore, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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